IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JAMES E. MORROW,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 99-732-SLR
	)	
KENNETH S. APFEL, Commissioner of Social Security,	)	
	)	
Defendant.	)	

Gary C. Linarducci, Esquire, New Castle, Delaware. Counsel for Plaintiff.

Carl Schnee, United States Attorney, Virginia Gibson-Mason, Assistant United States Attorney, United States Attorney's Office, Wilmington, Delaware. Counsel for Defendant. Of Counsel: John M. Sacchetti, Regional Chief Counsel, Robert W. Flynn, Assistant Regional Counsel, Social Security Administration, Philadelphia, Pennsylvania.

MEMORANDUM OPINION

Dated: March 16, 2001
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiff James E. Morrow filed this action against defendant Kenneth S. Apfel, the Commissioner of Social Security ("Commissioner") on November 2, 1999. (D.I. 1) Plaintiff seeks judicial review pursuant to 42 U.S.C. § 405(g) of a decision by the Commissioner denying his claim for disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. § 401-433. Currently before the court are the parties' cross-motions for summary judgment.[1] (D.I. 7, 9) For the reasons that follow, the court shall grant plaintiff's motion and deny defendant's motion.

II. PROCEDURAL HISTORY

On May 9, 1997, plaintiff filed a claim for disability benefits due to fibromyalgia, hypertension, irritable bowel syndrome and depression, alleging an onset date of March 1, 1997. (D.I. 4 at 17) The claim was rejected initially on July 14, 1997, and again upon reconsideration on August 14, 1997. (Id.) On March 27, 1998, an administrative law judge ("ALJ") held a hearing at which plaintiff, represented by counsel, and a vocational expert testified. (Id.) Medical evidence was submitted to supplement testimony given at the hearing.

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[1]Plaintiff waived his right to file a response brief. (D.I. 11)

On September 23, 1998, the ALJ issued a decision denying plaintiff benefits. (D.I. 4 at 14) In considering the entire record, the ALJ found the following:

> 1. The Claimant met the disability insured status requirements of the [Social Security] Act on March 1, 1997, the date the claimant stated he became unable to work, and continues to meet them through December 31, 2001.
>
> 2. The claimant has not engaged in substantial gainful activity since March 1, 1997.
>
> 3. The medical evidence establishes that the claimant has severe fibromyalgia, irritable bowel syndrome, hypertension, and depression, but that he does not have an impairment or combination of impairments listed in, or medically equal to, one listed in Appendix 1, Subpart P, Regulations No. 4.
>
> 4. I do not find the claimant's testimony and allegations credible regarding the severity of his impairments, pain, and symptoms, and their effect on his functional abilities.[2]

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[2]The ALJ elaborated on the basis for his determination of credibility:

> I do not find the claimant's testimony and allegations credible regarding the severity of his impairments and pain and their effect on his functional abilities. The medical evidence establishes the existence of impairments which may produce some of the pain and symptoms the claimant has alleged. However, Mr. Morrow is able to care for his own personal needs and perform a variety of daily activities including housework, yard work, and shopping. The claimant is able to drive an automobile and attend church activities. These activities evidence an ability to perform at least sedentary exertional tasks.
>
> Additionally, the medical evidence does not reflect any objective clinical findings or signs other than multiple trigger points. Laboratory testing has

5. The claimant has the residual functional capacity to perform the physical exertion and nonexertional requirements of work except for lifting and carrying more than 10 pounds of weight; standing or walking for more than limited periods; performing work requiring more than simple, routine, one-to-two step, job tasks; and performing work requiring sustained concentration and attention (20 C.F.R. § 404.1545).

6. The claimant is unable to perform his past relevant work as a cosmetologist.

7. The claimant's residual functional capacity for the full range of sedentary work is reduced by restrictions to jobs involving simple, routine, one-to-two step, job tasks and jobs not requiring sustained concentration and attention.

8. The claimant is 44 years old, which is defined as a younger individual (20 C.F.R. § 404.1563).

9. The claimant has a high school education (20 C.F.R. § 404.1564).

10. The claimant does not have any acquired work skills which are transferable to the skilled or semiskilled work functions of other work (20 C.F.R. § 404.1568).

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been normal. MRI scans and EMG testing have been normal. A muscle biopsy was also normal. The claimant does not have any neurological conditions, and neurological examinations throughout the record have been normal. The claimant has a normal gait and station and normal (5/5) muscle strength in all extremities.

Functional assessments from treating physicians have indicated that the claimant is able to perform at least limited standing or walking and lift from 10 to 20 pounds of weight. These functional abilities are consistent with the performance of sedentary work. (D.I. 4 at 23-24)

> 11. Based on an exertional capacity for sedentary work, and the claimant's age, education, and work experience, section 404.1569 and Rule 201.28, Table No. 1, Appendix 2, Subpart P, Regulations No. 4, would direct a conclusion of "not disabled."
>
> 12. Although the claimant's additional nonexertional limitations do not allow him to perform the full range of sedentary work, using the above-cited rule as a framework for decision making, there are a significant number of jobs in the national economy which he could perform. Examples of such jobs are: office clerk, cashier, and assembler. These jobs exist in significant numbers in the regional and national economies.
>
> 13. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision (20 C.F.R. § 404.1520(f)).

(D.I. 4 at 26-27)

On September 28, 1999, the Appeals Council denied plaintiff's request for review, stating that the ALJ's decision "stands as the final decision of the Commissioner of Social Security in [plaintiff's] case." (D.I. 4 at 6-7) Plaintiff now seeks review of this final decision before this court pursuant to 42 U.S.C. § 405(g).

III. FACTS EVINCED AT THE ADMINISTRATIVE LAW HEARING

Plaintiff was born on August 7, 1954. (D.I. 4 at 95) He is married with an eight-year-old son. (D.I. 4 at 42) Plaintiff completed high school and about one year of hair styling school, and owned his own hair styling salon for over fifteen years. (D.I. 4 at 41)

Plaintiff testified that he was diagnosed with fibromyalgia over twenty years before, and only stopped working once the pain became too much for him to bear. (D.I. 4 at 42) Plaintiff has not engaged in any substantial gainful activity since March 1, 1997. (D.I. 4 at 18)

Plaintiff testified that his entire body is pressure sensitive, with trigger points in his feet, chest, and buttocks. (D.I. 4 at 44) He cannot grip or squeeze objects, and he cannot perform any repetitive movement, although he can pour a gallon of milk. (D.I. 4 at 43, 51) He also suffers from muscle pain which restricts his mobility. (D.I. 4 at 43)

Plaintiff testified that he only has a few "good hours" in the day, usually in the morning, and after 11 AM it is "downhill." (D.I. 4 at 43) He rests about fifteen times a day for between 10 and 45 minutes each time. (D.I. 4 at 48) He can walk only 10 minutes before he needs to stop, and can sit or stand for 10-15 minutes at a stretch. (D.I. 4 at 49, 50) Plaintiff prepares his own meals, cleans the dishes, dresses himself, and does light housework and gardening, although stopping frequently during these activities because of pain. (D.I. 4 at 45) Plaintiff drives about twenty or thirty miles per month, doing light grocery shopping, and taking his son to the pool. (D.I. 4 at 46, 47) He also plays shuffleboard at his church once a week for half an hour. (D.I. 4 at 54)

Plaintiff further testified that he sees a primary care physician every three to four months, but is not seeing a psychologist or psychiatrist for depression. (D.I. 4 at 52, 55) Plaintiff does not undergo regular physical therapy. He claimed he does "basic general stretching," although he was in water therapy for three months but stopped because of pain. (D.I. 4 at 47, 51) The pain also affects his concentration when reading and doing puzzles. (D.I. 4 at 56)

Plaintiff testified that he was taking Trazodone, Panax, Demerol, Pepsin, Zestril and Lipitor. (D.I. 4 at 55) He also claimed that he suffers from constipation and other bowel problems from the medications and spends over an hour in the bathroom each day as a result. (D.I. 4 at 52)

IV. VOCATIONAL EVIDENCE

At the hearing, the ALJ called Agnes K. Gallen ("Gallen") as an independent vocational expert. Gallen concluded that plaintiff's skills as a hairdresser are not transferable, but his skills used to manage his business, such as keeping records and scheduling, are transferable to other jobs. (D.I. 4 at 59) The ALJ then asked Gallen the following question:

> A younger individual, high school education plus hair dressing school, work history as described without regard to any testimony, sedentary [residual functional capacity]. Because of the fatigue factor, pain factor, one, two step simple routine operations involving little decision making. Not requiring sustained concentration and attention. By that I mean it would allow for minor lapses of concentration but attention

> and concentration could be readily summoned as needed for the requisite minute or so to complete the activity or task. With those limitations what, if any, jobs exist?

(D.I. 4 at 60) Gallen answered that plaintiff could perform an entry-level job involving sedentary exertion, such as a general office clerical position. (Id.) She estimated that there are 882 such positions in Delaware, and 310,426 in the national economy. (D.I. 4 at 61) Gallen also recommended a cashiering position, of which there are 1,567 sedentary positions in Delaware, and 576,311 nationally. (Id.) Gallen was also asked about simple assembly positions, and testified that according to the residual functional capacity report by Dr. Heldt, plaintiff could not perform those jobs because he is limited to two hours of sitting, and two hours of standing and walking in the day. (Id.) However, according to Dr. Fink's report, plaintiff could perform the above jobs, since he could sit for six hours, and stand and walk for two hours with getting up to walk around every 15 minutes. (D.I. 4 at 62) Nevertheless, Gallen concluded that since an employer's tolerance for absenteeism would be only once a month, an employer would not keep plaintiff on for long since according to the physicians' reports, he would be absent from work about four times per month. (Id.)

The ALJ then presented the following hypothetical to Gallen:

> Assume [plaintiff's] testimony [is] credible regarding limitations and capabilities. This connection, this was a self-employed hair dresser until March 1997, he was working with his own scheduled breaks prior to that

> time. He says he cannot work even other jobs at this point in time because of frequent rest periods and the inability to perform repetitive type work. Specifically during a 16 hour period of time he has to rest approximately 15 times, lasting anywhere from 10 to 45 minutes. During this 10 to 45 minutes he can engage in overseeing the meal being cooked, assisting his son at homework. I also have pain levels fluctuating from six to eight four or five days a week. That would be in the high moderate to low severe range. At times this can go to nine or ten. I asked him about a booth cashiering type work. He indicated that he had these pressure points and body pressures that are very sensitive that affects his ability to grip and grasp and squeeze. Sitting is 10 minutes, standing is 10 to 15 minutes, walking is 10 minutes at a time before alternating to another position. If one were to assume those elements of the claimant's testimony [are] credible, what impact does that have on his ability to do those jobs?

(D.I. 4 at 62-63) Gallen concluded that plaintiff would not be able to do those jobs in a competitive labor market because his pain would cause him to take frequent breaks and be absent from work. The pain would also affect his concentration and ability to grasp objects as required in a cashiering position. (D.I. 4 at 63)

V. MEDICAL EVIDENCE

Neurologist Dr. Alan J. Fink has been treating plaintiff since 1982, when plaintiff was first diagnosed with fibromyalgic syndrome. (D.I. 4 at 119, 213) In an April 29, 1996 progress note by Dr. Fink, plaintiff complained of increased muscle aching. Dr. Fink confirmed a diagnosis of fibromyalgia and referred plaintiff to another neurologist for a muscle biopsy to test for an associated muscle condition. (D.I. 4 at 221, 265)

On May 30, 1996, plaintiff was evaluated by neurologist Dr. Donald L. Schotland. Plaintiff complained of a history of muscle pain, occasional forgetfulness, rare hazy vision, decreased hearing in the right ear, occasional right tinnitus, some subjective dizziness, and intermittent urinary urgency without burning. (D.I. 4 at 218) Dr. Schotland confirmed a diagnosis of fibromyalgia, even though laboratory testing, EMG examinations, and MRI scans of plaintiff's cervical spine and brain were normal. (Id.) Plaintiff had only mild degenerative changes on an MRI of the thoracic spine. (D.I. 4 at 219) Plaintiff's physical examination was within normal limits, his gait and strength were normal, and his sensory examination was normal. (Id.) Plaintiff had a normal range of motion in his back with negative straight leg raising testing. (Id.) Plaintiff's muscle biopsy studies were normal. (D.I. 4 at 217)

On July 16, 1996, Dr. Fink noted that plaintiff had continued complaints of aching and pain throughout his body. (D.I. 4 at 223) Although plaintiff's tests were normal, Dr. Fink noted:

> I do not feel the patient can carry out a full time job, such as he is doing as a self-employed hair stylist. I believe the demands and rigors of working in this type of position will be too great with the degree of muscle aching that the patient complains of.

(Id.)

On November 18, 1996, plaintiff had a hearing evaluation performed at Christiana Hospital. The results were normal,

except for difficulties hearing high frequency sounds in his right ear. (Id.)

On December 23, 1996, Dr. Schotland indicated that plaintiff did not have evidence of a metabolic muscle disease and recommended symptomatic treatment. (D.I. 4 at 235, 285) However, a note from Dr. Fink dated March 17, 1997 listed diagnoses of fibromyalgia and chronic fatigue syndrome. (D.I. 4 at 238) Dr. Fink wrote that plaintiff was currently neurologically stable and no further diagnostic studies were recommended. (Id.) Plaintiff's medications included Desyrel, Pepcid, Ultra, Prinivil, Lobed, and Panax. Claimant complained of muscle aching in many different areas in the upper and lower body and other various complaints including fatigue, difficulty swallowing, bladder pain and "fuzzy thinking." (Id.)

Plaintiff also received treatment from internist Dr. Cynthia A. Heldt in 1996 and 1997, and complained of similar symptoms during this period. (D.I. 4 at 241-246) In a September 15, 1997 treatment note, Dr. Heldt indicated that plaintiff was able to exercise regularly during the day.[3] (D.I. 4 at 298)

Rheumatologist Dr. James Newman examined plaintiff on June 2, 1997, and confirmed an earlier diagnoses of fibromyalgia.[4]

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[3]On May 15, 1997, plaintiff's physical therapist noted that plaintiff exhibited cervical spine pain and motion restriction. (D.I. 4 at 307)

[4]Dr. Newman initially evaluated plaintiff in April 1994, and again on February 19, 1996. (D.I. 4 at 247)

(D.I. 4 at 247) Dr. Newman's physical examination of plaintiff showed "typical tender points," and a neurological exam and EMG nerve conduction study were normal. (Id.) Plaintiff complained of pain, fatigue, lack of endurance, numbness, and swelling. He also had difficulty getting in and out of bed and periodically used a cane. (Id.)

On March 5, 1998, Dr. Newman completed a fibromyalgia residual functional capacity questionnaire, in which he determined plaintiff's prognosis to be "fair." (D.I. 4 at 308) Plaintiff had symptoms of multiple tender points, nonrestorative sleep, chronic fatigue, morning stiffness, muscle weakness, subjective swelling, irritable bowel syndrome, frequent headaches, temporomandibular joint dysfunction, numbness and tingling. (Id.) Dr. Newman also stated that certain emotional factors contribute to the severity of plaintiff's condition. (Id.)

On March 5, 1998, Dr. Heldt also completed a fibromyalgia questionnaire, in which she concluded a diagnosis of fibromyalgia, hypertension, irritable bowel syndrome, and subjective hearing loss. (D.I. 4 at 315) Laboratory testing, MRI scans, EMG study, and muscle biopsy testing were normal. (Id.) Plaintiff exhibited symptoms of multiple tender points, nonrestorative sleep, chronic fatigue, morning stiffness, muscle weakness, subjective swelling, irritable bowel syndrome, frequent

headaches, numbness and tingling, and chronic fatigue syndrome. (Id.)

On March 5, 1998, Dr. Fink completed a physical residual functional capacity questionnaire. (D.I. 4 at 316) Dr. Fink concluded a diagnosis of fibromyalgia. Plaintiff exhibited no side effects from medications, although plaintiff experienced depression secondary to pain, and that experience of pain was often severe enough to interfere with plaintiff's attention and concentration. (D.I. 4 at 317) Dr. Fink reported that plaintiff was able to stand or walk for about two hours in an eight-hour workday, and sit for at least six hours in an eight-hour workday. (Id.) Plaintiff can continuously sit or stand for 45 minutes at a time, and plaintiff would need to take unscheduled breaks during a workday. (Id.) Dr. Fink noted that plaintiff must walk every 15 minutes for 5 minutes. Plaintiff was also capable of lifting up to 20 pounds of weight, and had no significant limitations regarding repetitive reaching, handling, or fingering, although plaintiff could not stoop or crouch. (D.I. 4 at 318) Dr. Fink wrote the plaintiff's treatments or impairments would result in absences from work of more than four times a month, although he placed a question mark after that statement. (D.I. 4 at 319)

On March 24, 1998, Dr. Heldt completed a physical residual functional capacity questionnaire, and noted symptoms of pain, subjective swelling, and shooting pain. (D.I. 4 at 320) Dr.

Heldt's only objective findings were multiple tender points. (Id.) Plaintiff had depression and anxiety resulting from fibromyalgia, and experienced pain often severe enough to interfere with attention and concentration. (D.I. 4 at 321) Dr. Heldt concluded that plaintiff was capable of low stress jobs, and could work at home cutting hair if he could schedule it. (Id.) Dr. Heldt determined that plaintiff could sit for about two hours, and stand or walk for about two hours in an eight-hour workday. (Id.) Plaintiff can sit or stand for only 45 minutes at a time, and could lift and carry about ten pounds of weight. (Id.) Plaintiff could perform virtually no stooping or crouching, and was also limited in repetitive reaching, handling or fingering. (D.I. 4 at 321-22) Dr. Heldt concluded that plaintiff's absences from work would be more than four per month. (D.I. 4 at 323)

A consultative psychological evaluation was conducted in May 1998 by Frederick Kurz, Ph.D. (D.I. 4 at 324-325) A mental status examination indicated plaintiff was oriented, and he demonstrated adequate attention, concentration, memory and registration. (D.I. 4 at 326) Although Dr. Kurz noted that plaintiff's mood was depressed, his affect appeared to be within normal limits. (Id.) Plaintiff complained that he was in constant pain throughout the evaluation, and often moaned during the testing. (Id.) During cognitive testing, plaintiff constantly fidgeted, moved, squeezed his hands, and shook his

arms. (Id.) Dr. Kurz concluded that plaintiff was functioning within the average ranges of cognitive functioning, and demonstrated moderate levels of depression. (D.I. 4 at 325) Dr. Kurz also noted that while pain seemed to be evident it may be "a bit exaggerated" on his responses to the MMPI testing. (D.I. 4 at 326)

Dr. Kurz also completed a mental functional assessment. Plaintiff's abilities to make occupational adjustments, performance adjustments, and personal-social adjustments necessary to perform work were all rated "unlimited/very good" with the exception of dealing with work stresses which was rated as "good." (D.I. 4 at 328) Dr. Kurz concluded that plaintiff suffered from "mild to moderate vocational impairments due to chronic pain and depression." (D.I. 4 at 327)

VI. STANDARD OF REVIEW

"The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, [are] conclusive," and the court will set aside the Commissioner's denial of plaintiff's claim only if it is "unsupported by substantial evidence." 42 U.S.C. § 405(g); 5 U.S.C. § 706(2)(E) (1999); see Menswear Med. Ctr. v. Heckler, 806 F.2d 1185, 1190 (3d Cir. 1986). As the Supreme Court has held,

> "substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Accordingly, it

> "must do more than create a suspicion of the existence of the fact to be established. . . . It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (quoting NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939)).

The Supreme Court also has embraced this standard as the appropriate standard for determining the availability of summary judgment pursuant to Fed. R. Civ. P. 56:

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.
>
> Petitioners suggest, and we agree, that this standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986) (internal citations omitted). Thus, in the context of judicial review under § 405(g),

> "[a] single piece of evidence will not satisfy the substantiality test if the [Commissioner] ignores, or fails to resolve, a conflict created by countervailing evidence. Nor is evidence substantial if it

> is overwhelmed by other evidence — particularly certain types of evidence (e.g., that offered by treating physicians) — or if it really constitutes not evidence but mere conclusion."

Brewster v. Heckler, 786 F.2d 581, 584 (3d Cir. 1986) (quoting Kent v. Schweiker, 710 F.2d 110, 114 (3d Cir. 1983)). Where, for example, the countervailing evidence consists primarily of the claimant's subjective complaints of disabling pain, the Commissioner "must consider the subjective pain and specify his reasons for rejecting these claims and support his conclusion with medical evidence in the record." Mattel v. Bowen, 926 F.2d 240, 245 (3d Cir. 1990).

VII. DISCUSSION

A. Standards for Determining Disability

Congress enacted the Supplemental Security Income Program in 1972 "to assist 'individuals who have attained age 65 or are blind or disabled' by setting a guaranteed minimum income level for such persons." Sullivan v. Zebley, 493 U.S. 521, 524 (1990) (quoting 42 U.S.C. § 1381). Disability is defined in § 1382c(a)(3) as follows:

> (A) Except as provided in subparagraph (C), an individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.

> (B) For purposes of subparagraph (A), an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.
>
> . . .
>
> (D) For purposes of this paragraph, a physical or mental impairment is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

42 U.S.C. § 1382c(a)(3). Governing regulations set forth a five-step test for determining whether a claimant falls within this definition:

> The first two steps involve threshold determinations that the claimant is not presently working and has an impairment which is of the required duration and which significantly limits his ability to work. See 20 C.F.R. §§ 416.920(a)-(c) (1989). In the third step, the medical evidence of the claimant's impairment is compared to a list of impairments presumed severe enough to preclude any gainful work. See 20 C.F.R. pt. 404, subst. P, App. 1 (pt. A) (1989). If the claimant's impairment matches or is "equal" to one of the listed impairments, he qualifies for benefits without further inquiry. [20 C.F.R.] § 416.920(d). If the claimant cannot qualify under the listings, the analysis proceeds to the fourth and fifth steps. At these steps, the inquiry is whether the claimant can do his own past work or any other work that exists in the national economy, in view of his age, education, and work experience. If the claimant cannot do

> his past work or other work, he qualifies for benefits. [20 C.F.R.] §§ 416.920(e) and (f).

Sullivan, 493 U.S. at 525.

The determination whether a claimant can perform other work may be based on the administrative rulemaking tables provided in the Department of Health and Human Services Regulations ("the grids"). See Jesurum v. Sec'y of Health & Human Servs., 48 F.3d 114, 117 (3d Cir. 1995) (citing Heckler v. Campbell, 461 U.S. 458, 468-70 (1983)). The grids require the ALJ to take into consideration the claimant's age, educational level, previous work experience, and residual functional capacity. See 20 C.F.R. §404, subst. P, app. 2 (1999). If the claimant suffers from significant non-exertional limitations, such as pain or psychological difficulties,[5] the ALJ must determine, based on the

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[5]The regulations list the following examples of non-exertional limitations:

> (i) You have difficulty functioning because you are nervous, anxious, or depressed;
> (ii) You have difficulty maintaining attention or concentrating;
> (iii) You have difficulty understanding or remembering detailed instructions;
> (iv) You have difficulty in seeing or hearing;
> (v) You have difficulty tolerating some physical feature(s) of certain work settings, e.g., you cannot tolerate dust or fumes; or
> (vi) You have difficulty performing the manipulative or postural functions of some work such as reaching, handling, stooping, climbing, crawling, or crouching.

20 C.F.R. § 404.1569a(c).

evidence in the record, whether these non-exertional limitations further limit the claimant's ability to work. See 20 C.F.R. § 404.1569a(c)-(d). If they do not, the grids may still be used. If, however, the claimant's non-exertional limitations are substantial, the ALJ must use the grids as a "framework" only. See 20 C.F.R. § 404, subst. P, app. 2, § 200(d)-(e). In such a case, or if a claimant's condition does not match the definition provided in the grids, determination of whether the claimant can work is ordinarily made with the assistance of a vocational specialist. See Santise v. Schweiker, 676 F.2d 925, 935 (3d Cir. 1982); see also Gauthney v. Shalala, 890 F. Supp. 401, 409 (E.D. Pa. 1995) (holding that vocational expert is necessary when plaintiff's non-exertional impairments must be evaluated).

B. Application of the Five-Step Test

In the present case, the first four steps of the five-part test to determine whether a person is disabled are not at issue: (1) plaintiff is not working; (2) plaintiff's impairment has lasted more than twelve months; (3) plaintiff does not have an impairment equal to or meeting one listed in the regulations; and (4) plaintiff is unable to perform his past relevant work. The issue in this case concerns the fifth step: whether or not plaintiff can perform other work existing in the national economy. See Mason v. Shalala, 994 F.2d 1058, 1064 (3d Cir. 1993).

In the context of this five-step test, plaintiff had the burden of demonstrating that he was unable to engage in his past relevant work. See 42 U.S.C. §§ 416(I), 423(d)(1)(A); Mason, 994 F.2d at 1064. Since the ALJ determined that plaintiff satisfied that requirement, the burden shifted to the Commissioner to show that plaintiff can perform other work existing in the national economy. See Mason, 994 F.2d at 1064. In making this determination, the ALJ referred to the grids, specifically Vocational Rule 201.28, which states that a claimant aged 18-44, with at least a high school education, non-transferable skills and the residual functional capacity for sedentary work, is not disabled.[6] The ALJ acknowledged that plaintiff's additional non-exertional limitations reduced the range of sedentary work that he could perform to jobs involving simple, routine, one-to-two step tasks that do not require sustained concentration and attention. Relying on testimony by a vocational expert and dismissing plaintiff's complaints of pain as not credible, the ALJ concluded that there were such positions in the regional economy suitable for plaintiff, including office clerk, cashier and assembler. (D.I. 4 at 27) Because the court finds that the ALJ did not give adequate consideration to plaintiff's subjective

[6]Since plaintiff was 44 years old at the time of the ALJ hearing, the court notes that Vocational Rule 201.28 dictates that individuals aged 45-49 with similar characteristics are also not disabled.

complaints of pain, the court shall grant summary judgment in favor of plaintiff.

C. The ALJ Did Not Adequately Consider Plaintiff's Complaints of Pain

Allegations of pain and other subjective symptoms must be consistent with objective medical evidence, such as medical signs and laboratory findings. See 20 C.F.R. § 404.1529. Once an ALJ concludes that a medical impairment that could reasonably cause the alleged symptoms exists, he must evaluate the intensity and persistence of the pain or symptom, and the extent to which it affects the individual's ability to work. This obviously requires the ALJ to determine the extent to which a claimant is accurately stating the degree of pain or the extent to which he or she is disabled by it. See id.

In Ferguson v. Schweiker, 765 F.2d 31, 37 (3d Cir. 1985), the Third Circuit reiterated its standard regarding subjective complaints of pain: (1) subjective complaints of pain should be seriously considered, even where not fully confirmed by objective medical evidence, see Smith v. Califano, 637 F.2d 968, 972 (3d Cir. 1981); Bittel v. Richardson, 441 F.2d 1193, 1195 (3d Cir. 1971); (2) subjective pain "may support a claim for disability benefits," Bittel, 441 F.2d at 1195, and "may be disabling," Smith, 637 F.2d at 972; (3) when such complaints are supported by medical evidence, they should be given great weight, see Taybron v. Harris, 667 F.2d 412, 415 n.6 (3d Cir. 1981); Simmonds v.

Heckler, 807 F.2d 54, 58 (3d Cir. 1986); Dobrowolsky v. Califano, 606 F.2d at 409; and (4) where a claimant's testimony as to pain is reasonably supported by medical evidence, the ALJ may not discount claimant's pain without contrary medical evidence. See Green v. Schweiker, 749 F.2d 1066, 1070 (3d Cir. 1984); Smith, 637 F.2d at 972.

In this case, the ALJ concluded that plaintiff had a discernible medical condition that could reasonably cause him pain. However, the ALJ determined that plaintiff's testimony about the extent of his pain was exaggerated, and that plaintiff could perform limited sedentary work despite his complaints of incapacitating pain. That ruling is not clearly supported by substantial evidence in the record.

Although plaintiff's laboratory test results were generally normal, plaintiff's treating physicians documented a long history of fibromyalgia that caused plaintiff muscular pain. Dr. Heldt and Dr. Fink agreed that plaintiff had limited ability to stand, walk and sit for long periods of time, resulting in frequent breaks during the workday. They concurred that plaintiff could not lift heavy objects, nor could he stoop or crouch. Dr. Heldt further concluded that plaintiff could not perform repetitive reaching, handling or fingering. Both physicians agreed that plaintiff experienced pain severe enough to interfere with his attention and concentration, and that plaintiff's impairments and/or treatments would result in at least four absences from

work per month, although Dr. Fink indicated that he was not sure of this. Furthermore, the consultative psychological examination performed by Dr. Kurz does not contradict plaintiff's pain as documented by plaintiff's treating physicians, although Dr. Kurz claimed that plaintiff may have exaggerated his responses.[7] The ALJ did not point to any contrary medical evidence to support his conclusion that plaintiff's pain is not as severe as plaintiff alleged. In fact, it appears that the ALJ based his determination on the extent of plaintiff's daily activities, which plaintiff claimed he performs with difficulty.[8] Without

[7]Plaintiff also argues that the ALJ did not follow the "treating physician doctrine." The ALJ should give greater weight to the records of Dr. Heldt and Dr. Fink over the one-time evaluation by Dr. Kurz. See Plummer v. Apfel, 186 F.3d 422, 429 (3d Cir. 1999) (holding that treating physicians' reports should be accorded great weight, especially when their opinions are based on a continuing observation of patient's condition over prolonged period of time). However, the court declines to rule on whether the ALJ gave greater deference to the reports of plaintiff's treating physicians over that of Dr. Kurz, since it appears that the ALJ's decision was solely based on his assessment of plaintiff's credibility.

[8]In Smith, 637 F.2d at 971, the claimant suffered from a chronic duodenal ulcer disease and spastic irritable colon. The ALJ relied on the claimant's testimony that he "does shopping and last fall went hunting twice" to find an absence of disability. The Third Circuit noted that "shopping for the necessities of life is not a negation of disability and even two sporadic occurrences such as hunting might indicate merely that the claimant was partially functional on two days. Disability does not mean that a claimant must vegetate in a dark room excluded from all forms of human and social activity." Id.

contrary medical evidence, the ALJ must give serious consideration to plaintiff's subjective testimony.[9]

At the hearing before the ALJ, the vocational expert recommended sedentary positions such as clerical work or cashiering, but also noted that if plaintiff did need to take frequent breaks and numerous absences as suggested, he would not be able to keep such positions in a competitive market. The court concludes that the ALJ's rejection of plaintiff's complaints of disabling pain was not based on substantial evidence. Therefore, considering plaintiff's testimony as credible, plaintiff could not perform even the sedentary jobs that the vocational expert initially recommended.[10]

Accordingly, the court concludes that the Commissioner has failed to demonstrate that there exists in the national economy

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[9]Moreover, a claimant is entitled to substantial credibility if he has a work record of continuous employment for a substantial duration of time. See Bazemore v. Heckler, 595 F. Supp. 682, 688 (D. Del. 1984). Plaintiff owned his own hair salon for fifteen years and should be accorded this consideration.

[10]Plaintiff also argues that the ALJ presented the vocational expert with an incomplete hypothetical question by omitting the exact location of plaintiff's "pressure points" and his potential absenteeism from work. See Podedworny v. Harris, 745 F.2d 210, 218 (3d Cir. 1984) (holding that vocational expert's testimony concerning claimant's ability to perform alternative employment may only be considered for purposes of disability if question accurately portrays claimant's individual physical and mental impairments). Although the ALJ omitted these factors from his hypothetical questions, the court finds that the vocational expert nevertheless considered them in her conclusion that plaintiff would not be able to perform the sedentary positions she originally recommended.

alternative substantial gainful employment that plaintiff is capable of performing.

VIII. CONCLUSION

For the reasons stated above, the court shall grant plaintiff’s motion and deny defendant’s motion. An appropriate order shall issue.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JAMES E. MORROW,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 99-732-SLR
	)	
KENNETH S. APFEL, Commissioner of Social Security,	)	
	)	
Defendant.	)	

O R D E R

At Wilmington this 16th day of March, 2001, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Plaintiff's motion for summary judgment (D.I. 7) is granted.

2. Defendant's motion for summary judgment (D.I. 9) is denied.

3. The clerk is directed to enter judgment in favor of plaintiff.

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United States District Judge